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SYMPOSIUM PAPER

IVHS, LEGAL PRIVACY, AND THE LEGACY OF DR. FAUSTUS

Robert Weisberg†

I. INTRODUCTION

This essay addresses the relationship that may develop between Intelligent Vehicle Highway Systems and the corner of privacy law that includes the Fourth Amendment. As a matter of legal doctrine, my subject is how the Fourth Amendment may apply to IVHS. As I argue below, however, neither Fourth Amendment case law nor current federal statutes governing privacy and electronic communications can do our political or moral work for us in deciding how much privacy we must cede in creating IVHS. The technologies we create force upon us choices our legal system would rather not view as choices. Constitutional doctrine and rhetoric purport to deduce legal rules from an encounter of facts and principles that supposedly dictates results out of a sort of inexorable intellectual logic, but these deductions or inferences are ultimately *choices*. In fact, to reverse perspectives, contemplating how the Fourth Amendment could conceivably govern IVHS may end up telling us a great deal about the social choices we have buried under the rhetoric of Fourth Amendment jurisprudence.

Consider drunk-driving roadblocks as a figurative form of "technology," even without the more advanced electronic surveillance aids that will soon enhance these roadblocks. Roadblocks enable the police both to catch criminals and to make the roads safe. At the same time, they threaten privacy and enhance the possibility of capricious actions by the police. The constitutional arguments for and against these roadblocks could well have been written by a computer program drawing all the rhetorical tropes from previous cases. The result is some sort of balancing between vaguely invoked Fourth Amendment privacy rights and vaguely invoked utilitarian demands of law enforcement and traffic safety. And in performing this balance, the

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Supreme Court has found a procedural solution: almost any substantive balancing is acceptable if done at a high enough level of governmental authority with sufficient sensitivity to certain key criteria.[1]

That is, if it is the legislature or high administrative officials rather than the street police themselves who establish the objective circumstances for setting up roadblocks and the rules for implementing them, and if the police are given relatively little discretion in construing these rules, then the roadblocks will be legal.[2] Choices must be made about how much danger of drunk drivers in a particular place must be proved to justify some level of intrusion, or what, if any, pattern of selecting cars the police must follow, or what, if any, notice of the roadblocks the public must receive. The Court, however, is probably more concerned with how and by whom these choices are made than it is by what the choices ultimately are. Though some of the balancing criteria we see in relevant cases may seem substantive, it does not get us very far. All this rhetoric about balancing ultimately leads to a sort of irreducible, existential judgment call about values: it is wrong to call it "subjective," but it is equally wrong to call it "compelled" by argument and fact. It is a social choice, and the issue is how the social choice will be made.

Of course, IVHS will permit the police to do more than just block roads at selected intersections. Among its many features, what is most salient here is that IVHS could someday permit the state to know everywhere you have driven and when—every road you have taken, every toll you have paid, every gas station you have patronized. With IVHS, the state may end up knowing more about you than you yourself have bothered recording or remembering. Indeed, as a Fourth Amendment matter, IVHS raises the specter of the old infamous General Warrants or Writs of Assistance that inspired enactment of the Amendment in the first place. But modern Fourth Amendment doctrine may end up doing little more than spurring us to note that IVHS "raises Fourth Amendment concerns," and then we are back to the square one of making choices.

At square one, we will ask whether the state needs any special justification to amass all this information or to use it adversely to the driver or her companions. If there comes a major Fourth Amendment case about IVHS, it will be important to elucidate the interests or arguments on both sides, and of course good lawyering will require that this be done not just in terms of abstract principles or rhetorical tropes, but also with great factual and technical precision in terms of what the

1. Michigan Dept. of State Police v. Sitz, 496 U.S. 444, 453 (1990).
2. *Id.* at 452-54.

new technologies will do, offer, and threaten. Yet in some ways the question will reduce to a procedural one: Who will do the final balancing? Courts? Congress? Regulators? Police Chiefs? County Supervisors? How much of the balancing will be implicitly controlled by the private companies creating the technology—and thereby much of the vocabulary about the technology that will control the legal discussion?

A. *What the Fourth Amendment Can Do for IVHS*

In one sense, the constitutional approach is obvious. IVHS is about automobiles, and if there is one straightforward thing the Supreme Court has said about the Fourth Amendment in this century, it is that while homes enjoy great protection, automobiles enjoy little. The cases will remind us that because driving a car necessarily invites the "pervasive" regulation of the state, drivers must waive a great deal of privacy to drive;[3] moreover, automobiles are major tools of the criminal trade, and because of their "inherent mobility" the police must be free of stringent constraints in investigating them.[4] Does this mean that if motorists, at the time they receive drivers' licenses or get their cars registered, are informed that the state or state agents will have surveillance power over their cars through electronic devices, they are theoretically free to reject the privilege? Is this even a fair question, since most people view driving more as a right or a necessity than a privilege? And is individual bargaining over this quasi-contractual waiver possible? Can a driver opt out of some of the benefits of IVHS in exchange for retaining some of the protections against intrusion?

The waiver, pervasive regulation, and inherent mobility doctrines will probably mean that "substantive" Fourth Amendment doctrine will put little constraint on the designers and users of IVHS. And that may be just as well, because the better locus of the question is the legislature or administrative regulation, where "balancing of interests" can be done more systematically and forthrightly, without the subterfuge or shaky intellectual basis we find when courts do the balancing. In fact, Fourth Amendment law is now a great intellectual morass, so one should not expect much clear or enlightened legal thinking to bear on IVHS, even on the crucial question of the capacity of IVHS to track our movements in cars. On the other hand, many of the IVHS tools that involve oral communication are probably covered by The Electronic Communications Privacy Act, which sets out stringent and

3. United States v. Chadwick, 433 U.S. 1,11 (1977).
4. Carroll v. United States, 267 U.S. 132 (1925).

specific rules to control the government's "searches and seizures" of private electronic communications through wiretaps or other listening devices.[5]

B. *And What IVHS Can Do for the Fourth Amendment*

The irony, however, is that IVHS can contribute a good deal to Fourth Amendment law, because it can help steer much of our incoherent legal doctrine back towards the fundamental issues about the power of government over privacy. As I will suggest, we need to return Fourth Amendment law—or supplementary statute law—to what philosophers call the Rawlsian veil of ignorance—that idealized condition in which we convene to establish the best rules for our society before anyone of us knows whether she personally will turn out to be the beneficiary or the victim of the rules.[6] We have to imagine ourselves—our upstanding good-citizen selves—as possible objects of police intrusion; we have to decide how much of that we are willing to accept in exchange for the technological benefits of IVHS; and then we have to accept the consequence of the protections we demand: With or without an exclusionary rule, some very bad criminals will go free.

Fourth Amendment law these days is mostly about cops and robbers, with the cops usually winning. An abstracted doctrinalist—or a Warren Court idealist—might speak of a strong and elaborate fortress of rights to be free of warrantless searches and seizures, or at least from searches and seizures without probable cause, subject to a few "zealously guarded exceptions" such as exigency, plain view, search incident to arrest, consent, and so on.[7] In fact, a more realistic view is that though we still pay some rhetorical homage to the broader rights, the police win most cases.[8] The exceptions have swallowed much of the supposedly firm rules, and new exceptions have been added. For example, much police action is now viewed as a stop-and-frisk under *Terry v. Ohio*,[9] subject to a lighter reasonable cause requirement; the exigency, plain view, and search-incident-to-arrest exceptions have been broadened,[10] even a mistaken inference of consent from the

5. 18 U.S.C. § 2511(2)(a)(ii) (1994).

6. *See generally* JOHN RAWLS, A THEORY OF JUSTICE (1971).

7. *See generally* CHARLES WHITEBREAD & CHRISTOPHER SLOBOGIN, CRIMINAL PROCEDURE 166-217 (1993).

8. *See, e.g.*, Thomas Davies, *A Hard Look at What We Know (and Still Need to Learn) About the "Costs" of the Exclusionary Rule: The NIJ Study and Other Studies of "Lost" Arrests*, 1982 AM. BAR. FOUND. RES. J. 611 (suppression motions obstruct prosecution in trivial percentage of cases).

9. 392 U.S. 1 (1968).

10. *See generally* WHITEBREAD & SLOBOGIN, *supra* note 7.

wrong person can immunize a search,[11] and such old exotica as standing rules[12] or such new exotica as the independent source[13] or inevitable discovery[14] doctrines make it far more likely that the police can get their evidence in.

But that is the point—and the problem. Theoretically, the Fourth Amendment tells government what it can or cannot do, while a separate and less important thing called the exclusionary rule determines when a violation of the Fourth Amendment should deny the prosecutor use of the evidence in a criminal trial. In fact, concern with the perceived injustices of the exclusionary rule has distorted Fourth Amendment doctrine and debate. The issue of whether the criminal should go free because of the blundering constable[15] has so dominated the opinions and the scholarship that little attention has been paid to deeper social and political choices implicit in the Fourth Amendment itself. The focus is on cases where at least arguably the Fourth Amendment has been violated, and the issue is always whether the obviously guilty convict should go free. It would be helpful to shift our focus to view the Fourth Amendment as protecting rights wholly independently of the mechanics of criminal justice.

Unfortunately, Fourth Amendment scholarship is, on the whole, a bad form of analytic jurisprudence—empty assertions of deontological rights theory battling against arid and not very empirically sensitive claims of utilitarianism. In the major cases, and in the conventional scholarship about the cases, the principles of deontological rights and utilitarianism have been expressed in so vague or ill-grounded a way as to suggest that they are not to be taken seriously—except as rhetorical gestures. Thus, for example, in the doctrine concerning restrictions on the exclusionary rule, the conservative side offers arguments about cost-benefit analysis and incentives that recklessly ignore or mis-cite straightforward statistics,[16] or that rely on simplistic models of general deterrence that a first-year law student can easily refute in the analogous case of substantive criminal law.[17]

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11. Illinois v. Rodriguez, 497 U.S. 177, 186 (1990).

12. Rakas v. Illinois, 439 U.S. 128, 137 (1978).

13. Murray v. United States, 487 U.S. 533, 537 (1988).

14. Nix v. Williams, 467 U.S. 431, 439 (1984).

15. *See* People v. Defore, 242 N.Y. 13, 21 (1926) (Cardozo, J.) ("The criminal is to go free because the constable has blundered.").

16. United States v. Leon, 468 U.S. 897, 908 (1984).

17. Justice White's opinion, like Supreme Court jurisprudence on the exclusionary rule generally, assumes that there is no point in excluding evidence in cases where the police thought they were obeying the Fourth Amendment, or for other reasons did not "intend" to violate constitutional norms. This is the standard error about general deterrence introduced by Bentham and refuted by H.L.A. HART, PUNISHMENT AND RESPONSIBILITY 19 (1968).

Conversely, the liberal side is left haplessly pointing out these flaws but is trapped by the underlying indeterminacy of the empirical issues. It tries to escape the trap by attacking the fundamental premise that cost-benefit analysis is the proper discourse for the debate, pointing instead towards normative arguments about what constitutes privacy and acceptable government behavior, but lacking any confident alternative vocabulary to make those arguments. Moreover, the liberal side has never confronted the larger issue hauntingly raised by Earl Warren himself—that so long as doctrinal debates are driven by concerns over suppression of evidence, they can never address the large majority of police actions that are utterly unrelated to evidence-gathering but are perhaps much better indicators of the pathology of the political relationship between people and police.[18]

Thus, if the police were to search and seize black males at random merely to create social misery, or somewhat less malignly, if they were to search and seize gang members or prostitutes without reasonable or probable cause simply to disperse them and deter them from crime, the Fourth Amendment will prove useless so long as it depends on the exclusionary rule for enforcement. A recent questionnaire survey of Chicago's criminal justice system confirms that police are relatively undeterred by the exclusionary rule in high-volume, small-time drug and other vice cases where they suffer no great cost from dismissal of cases.[19] We then face the question about the exclusionary rule so often posed at and ignored by conservatives: Why does not the objection to the rule logically apply to the amendment itself? If we look past the exclusionary rule debate, we can see how we have evaded all serious choices about the constraints and sacrifices we are willing to impose on police investigators in the name of privacy because we have failed to determine what sort of privacy we want and how much of it we really have to sacrifice. The utilitarian discourse of deterrence is seductive because it enables judges and scholars to speak in apparently analytic and determinative terms. By contrast, to switch from sanctioning questions about the exclusionary rule back to the underlying Fourth Amendment issues risks either descent into conventional constitutional arguments about text and meaning—not

18. Terry v. Ohio, 392 U.S. 1, 13-14 (1968).

19. Myron W. Orfield, *Deterrence, Perjury, and the Heater Factor; An Exclusionary Rule in the Chicago Criminal Courts*, 63 COLO. U. L. REV. 75, 88-89 (1992). One of the most bizarre instances of the ineffectiveness of the rule is reported by Bradley Canon, *The Exclusionary Rule: Have Critics Proven That It Doesn't Deter Police?*, 62 JUDICATURE 398, 403 (1979) (some corrupt Chicago police had high suppression rate because they engaged in deliberately illegal searches of vice rings run by their friends, ensuring that suppression would kill prosecutions and enable them to throw public blame on the courts).

likely to yield much in the Fourth Amendment—or promises treatment of more broadly normative debates about privacy values.

The latter debates in turn risk all the problems now faced by standard liberal discourse: If we ask what sort of privacy we as society want, the problem is then identifying a coherent subject "we" outside the specific contexts of privacy the cases worry over. But it might be helpful to return to the obvious premise that the Fourth Amendment itself is in the Constitution and police are supposed to obey it regardless of the "technology" of the sanctioning system. Thus, we should insist, at least to move the thought experiment along, that the debate be framed in terms of what our private lives owe to the police under the assumption that the police are intelligently and in good faith obeying the Fourth Amendment. In fact, we should ask, if we owe a debt to the state, when and how was the debt contract arranged? We might thereby learn more about the relation between our private lives and more public duties and associations.[20]

Consider the choices that the Court has already made—or, to put it differently, the choices that have somehow occurred in the name of constitutional law: Though we imagine intrusions on our privacy as crossing some sort of categorical boundary, it certainly is a matter of degree. Many intrusions which we accept or tolerate might appear unacceptable or intolerable if they were done a little more efficiently or comprehensively—or perhaps done in mutual coordination. The state—or sometimes a private party—can discern with whom we correspond by mail,[21] with whom we talk on the phone,[22] to whom we write and from whom we receive checks,[23] and so on. Even in a supposedly privileged area—like our medical records or doctor-patient communications—mail, phone, and banking records might enable an outsider to construct much of our medical information anyway.[24]

Though theoretically our home is sacrosanct—if we have one—anyone who can get high enough over our house can look down and see what is in the yard,[25] and unless we make the most elaborate private arrangements, someone will see what is in our garbage.[26] We may imagine that no one will use this information in a manner that can hurt us, and that is largely right—though perhaps more at the grace of

20. *See generally* STUART SCHEINGOLD, THE POLITICS OF STREET CRIME: CRIMINAL PROCESS AND CULTURAL OBSESSION (1991).

21. United States v. Choate, 576 F.2d. 165, 168 (1978).

22. Smith v. Maryland, 442 U.S. 735, 738 (1979).

23. United States v. Miller, 425 U.S. 435, 438 (1976).

24. Lewis R. Katz, *In Search of a Fourth Amendment for the Twenty-First Century*, 65 IND. L. J. 549 (1990).

25. Dow Chemical Co. v. United States, 476 U.S. 227 (1986).

26. California v. Greenwood, 486 U.S. 35, 39 (1988).

others than because of any legal restriction. What about calls made to 900 numbers, or cable movies selected?

That is why it is useful to confront a complex new policy issue that might have to be resolved via contract and legislation, not constitutional rhetoric. To imagine a world without the Fourth Amendment is to see the moral and political issues cleanly, and to acknowledge that important privacy interests must be balanced against important law-enforcement interests.[27] But even if we remain within the non-empirical bounds of doctrine, analytic jurisprudence is incomplete if it assumes too narrowly and prematurely the nature of the "interests" to be balanced. Indeed, in the limited terms in which the Supreme Court speaks, it may be falsely assuming that the "competing interests" can initially be identified as independent variables.

Here is a helpful example from more conventional Fourth Amendment law: In *Florida v. Bostick*,[28] the Court held that a person was not "seized" in the meaning of the Fourth Amendment when the police confronted him in his seat in an interstate bus and asked him to consent to a search of his bags. The Court held that even if the suspect did not feel free to leave, the constraint came from pre-existing or self-selected circumstance of his "decision" to get on the bus, and though the police may have benefited from that constraint, they did not impose it.[29] What is the responsibility of the police in reinforcing or exploiting social constraints that ease its task? How is this issue related to such other Fourth Amendment concerns about claimed expectations of privacy at the border of public and private spaces—from garbage to shared apartments? Does the power of the police depend on the independent social norms that determine whether an expectation of privacy at this border is reasonable? In turn, can the legal inference avoid lowering the reasonable expectation? Do we want Bostick to assume the risk of entanglement with the state because he assumed the risk of constraint imposed by the facts of commerce and social geography? Did he really assume any risks at all, or merely suffer them?

This line of inquiry need not follow any predisposed path. It may well lead us to conclude that in some cases people owe the republic a great deal of selflessness and civic virtue; or that state authority merits so much respect that the mere display of it (as opposed to the use of state physical force) should be viewed as a non-coercive call to social

27. Christopher Slobogin, *The World Without a Fourth Amendment*, 39 UCLA L. REV. 1 (1991).

28. 501 U.S. 429 (1991).

29. *Id.* at 435-36.

duty, not an invasion of a boundary of freedom; or that somewhat conversely, people feel sufficiently secure from police power that we can comfortably define expectations of privacy independently of police power and then incorporate the boundaries by reference into the definition of legitimate police power. Nor is this inquiry without practical implications either, since a good argument for the warrant requirement is precisely that judges are good procedural devices for framing these evaluate trade-offs, especially behind the veil-of-ignorance ensured by a pre-search hearing.[30] The Fourth Amendment offers us a more public look at these issues than does the confession arena, since it is in Fourth Amendment law that we have to imagine in a more collective sense what autonomy and control over our persons, movements, and property, if not our minds, we reserve as against the state.

To return to IVHS: Let us imagine that the Los Angeles Police Department decides to devote, say, one half of its million-dollar-plus daily budget to an effort to follow one single person—let us call him O.J. Simpson (and change some of the now-historic facts). Hundreds of police officers, tens of cars, several police helicopters follow Simpson on a freeway. Inevitably, but partly with the active cooperation of the police, an even larger number of broadcasters, investigators, etc. from private media business become allies in the effort to track Simpson (I avoid the words "search" or "seize"). Now assume that Simpson realizes all this as he moves along the highway, and, in a panic, throws from his truck some piece of clothing that could tie him to a killing. Or imagine that a police car pulls alongside the truck and an officer shouts at him, "Where's the weapon?"

Any Fourth Amendment problems? Probably not. Technically, the police have done "nothing" that amounts to a constitutionally regulated state action under the Fourth Amendment—certainly they have stopped short of an arrest. Under recent case law, the police car's tracking of the Simpson vehicle does not require probable or even reasonable cause of a crime or criminal activity because the police do not physically touch Simpson, nor does he surrender to their authority.[31] Thus, when Simpson throws out the clothing he is freely abandoning the clothes to the public sphere where anyone can legally take them. Similarly, if Simpson says anything incriminating in response to the question, his statement is perfectly admissible despite the lack

30. Louis M. Seidman & Silas Wasserstrom, *The Fourth Amendment as Constitutional Theory*, 77 GEO. L. J. 19 (1988).

31. California v. Hodari D., 499 U.S. 621, 629 (1991).

of a Miranda warning, because he was not under custodial arrest when questioned.[32]

All this makes sense if we break this encounter down to tiny pieces of state action, in each of which the police make only a small investment in tracking or gathering information from Simpson. Nothing in Fourth Amendment law says that turning that effort into a massive investment of state and private resources raises any new legal issues, so long as no formal Fourth Amendment barrier has been crossed. And IVHS may prove to be the short-cut technological approach to doing just what this bizarrely plausible hypothetical imagines the police doing. After all, squadrons of police cars and helicopters would prove clumsy and costly anachronisms once IVHS permits the police to track Simpson silently and precisely, and possibly even to detect weapons in his car. Though IVHS may cost many billions, its economies of scale will essentially enable the police to do to all of us with insidious efficiency what it did so melodramatically for my hypothetical Mr. Simpson.

II. Fourth Amendment Law and Peripheral Searches

Despite my admonition that IVHS may tell us more about the Fourth Amendment than vice-versa, I now return to the more conventional premise of this essay—that is, to suggest where IVHS may fit in with the themes of Fourth Amendment law. Though no one doctrine or even set of doctrines directly addresses the incursions that IVHS may make on privacy, there are peripheral areas of Fourth Amendment law that may speak to us at least obliquely about a very borderline case like IVHS. In a sense, these areas represent the application of the basic definitions of searches and seizures to "special contexts"—outside the conventional arena of direct police investigation of crime—to which the Fourth Amendment nevertheless must be applied.

A. *"Special" Searches, Where the Prosecutor is an Afterthought*

There are two relevant categories of peripheral Fourth Amendment actions. The first category involves actions in which ostensibly the police are not investigating criminal conduct but which nevertheless do just barely cross the line into stops or searches or seizures; in these cases, the slight degree of intrusion and—more important—the ostensibly non-police purpose of the action cause the Court to soften

32. Berkemer v. McCarty, 468 U.S. 420, 441 (1984).

the legal consequences for the state. The second category involves actions which are unequivocally those of the police seeking to fight crime, but which, in the Court's view, stop just short of crossing any Fourth Amendment line. At the risk of blurring the focus on IVHS, I will briefly review these doctrinal area to give a sense of the constitutional background against which any future IVHS debate may occur.

As for the first category, the "administrative search" is the broadest example of a "special context" in which the Court is willing to relax the normal requirements of probable cause or warrant for searches. Nothing in the Fourth Amendment mentions criminal prosecutions in particular, so presumably any state invasion of privacy can trigger Fourth Amendment protection. But where the professed purpose of state action is "regulatory" and not "prosecutorial" (a suspicious distinction if there ever was one), the Court may permit an entry onto private (often business) property either without a warrant or with a warrant based on something less than probable cause.[33] So long as an administrative agency, such as OSHA or EPA, is acting under some clear legislative supervision, its inspectors may be able to obtain warrants to inspect premises merely as a part of a general inspection of the premises where regulatory violations may be present (that is, even if there is no probable cause to believe a crime has occurred).[34] Of course, under a plain view "windfall" approach, whatever they find, whether it proves an OSHA violation or a murder case, they may use whatever the find, even if they enter the premises knowing they might evidence of a true crime.

Sometimes the Court may even excuse the warrant requirement: (1) The agency may demonstrate that its inspections can only be effective if they are complete surprises to the owners of the premises, so it would be infeasible in any event to present the warrant to the owners;[35] (2) if the agency statute itself prescribes some sort of schedule of inspections, the statute itself might substitute for the warrant;[36] (3) sometimes a court may permit an "area warrant" authorizing searches of a number of premises of a given sort in a particular region, based on some vague "reasonable cause" that there may be violations in some of them.[37]

One type of "administrative search" that has particularly vexed the Court is that made by firemen after a suspicious fire. More broadly, the, administrative search doctrine expands *Terry* into a gen-

33. Camara v. Municipal Court, 387 U.S. 523, 535 (1967).
34. *See* Donovan v. Dewey, 452 U.S. 594 (1981).
35. New York v. Burger, 482 U.S. 691, 699 (1987).
36. Marshall v. Barlow's, Inc., 436 U.S. 307, 315 (1978).
37. Camara v. Municipal Court, 387 U.S. 523, 534 (1967).

eral jurisprudence of balancing or scale-sliding: the Court will balance the degree of intrusion and stigma of the state action against the importance of the governmental interest to establish the degree of probable or reasonable cause needed to justify the action and to determine whether or where a warrant is needed (and of what sort).[38]

By far the farthest reaching regulatory/administrative non-individualized search procedure ever to be upheld is the warrantless drug testing of railroad employees and customs agents in *Skinner v. Railway Labor Executives Ass'n*[39] and *National Treasury Employees Union v. Von Raab*.[40] In both cases, the Court held that the drug testing was indeed a search but that it was legal. The Railway case was easier (7-2) because it applied to employees involved in certain types of accidents or who violated specified safety rules, and was carried out according to elaborate regulations (though the government did not obtain individual warrants). The Court held that the regulations provided certainty and uniformity so that no warrant was needed, and that the government had an interest in testing employees that overbalanced the usual requirements of individualized suspicion. The scheme was a reasonable effort to ensure safety and was not a pretext for criminal investigation.

Von Raab was more troublesome (5-4) because the individuals tested were merely those seeking transfer or promotion to positions involving drug enforcement or the use of firearms. Almost by definition, these were employees who could otherwise establish their clean records in the customs service, so that they were precisely not the individuals who merited individualized suspicion.[41] (Under this scheme, the test results could not be used in a criminal prosecution without the person's consent.) Justices Stevens and Scalia joined Justices Marshall and Brennan in dissent, because in their view "neither frequency of use nor connection to harm is demonstrated or even likely."[42]

New Jersey v. T.L.O[43] treats searches of high school students and some of their effects essentially like administrative searches. A teacher told a principal that a 14-year old was smoking cigarettes in a lavatory. Upon the student's denial, the principal searched the student's purse and found marijuana inside. At least where the state agent is a school official and not a police officer, she may search with-

38. *See e.g.*, Michigan v. Tyler, 436 U.S. 499 (1978).
39. 489 U.S. 602 (1989).
40. 489 U.S. 656 (1989).
41. *Id.* at 682 (Scalia, J., dissenting).
42. *Id.* at 681 (Scalia, J., dissenting).
43. 469 U.S. 325 (1985).

out a warrant and with only vaguely reasonable cause. The Court did not clarify when the school officials or police could search lockers or desks. In *O'Connor v. Ortega*[44] the Court rejected the argument that governmental employees can never have a reasonable expectation of privacy in their workplaces. There was no majority opinion on the specific legality of a warrantless search of government psychiatrist's offices, desk, and files, where the search was by supervisors investigating violations of workplace rules, not police officers investigating crimes. A plurality said the search required reasonable cause but not probable cause or a warrant.

To return to the vehicular world of drunk-driver roadblocks, these constitute a special context where the state cannot really rely on an "administrative search" rationale, because the purpose is unquestionably to investigate crime. Instead, the courts have simply said that the extreme public exigency of the drunk driving problem, combined with the difficulty of apprehending drunk drivers, requires that the states have broad powers to stop cars on vague suspicions, rather than probable cause. (They do sometimes throw in a bit of an administrative rationale, suggesting that because of the "pervasive regulation" of cars and drivers of which all are aware, there is a bit of waiver the moment you get in your car.)

The background to the whole issue is the case of *Delaware v. Prouse*,[45] which essentially said that the stop of a car is a Fourth Amendment seizure—at least a *Terry* stop—so that some sort of individualized suspicion is necessary. That is pretty easy to obtain, since most drivers are always a little over the speed limit or tend to slide over the yellow line, but a decade or so ago the states began trying to assert greater power to set up roadblocks or checkpoints in high-risk areas. Here we have a funny sort of jurisprudential dilemma. Normally we require proof of individualized suspicion before permitting a seizure because otherwise state action may be random and arbitrary.[46]

But the states argued that if we make auto stops truly and designedly "random" (i.e., we stop every car) then we eliminate the danger of discriminatory or capricious selection of drivers.[47] In effect, we limit police discretion to stop cars at their whim by requiring them to stop even those cars they do not want to stop. This can entail stopping absolutely all cars, or cars chosen according to a deliberately mechanical formula—every third or tenth car, etc. Thus, the police will stop

44. 480 U.S. 709 (1987).
45. 440 U.S. 648 (1979).
46. *See e.g.*, Terry v. Ohio, 392 U.S. 1 (1968).
47. *See* Michigan, *supra* note 1, at 447.

all or many cars at a roadblock, briefly talk to the driver, sniff for alcohol, etc. The system authorizes the stop, but the police cannot look in the car or engage in any more invasive search or seizure unless the plain view or smell at the stop produces further evidence.[48] If they find further evidence a fully *Terry* stop and frisk or an arrest can then proceed.[49]

After years of confusing litigation, the Court in *Michigan Dept. of State Police v. Sitz*[50] approved a roadblock scheme which stopped all drivers; was set up in a safe location, caused minimum inconvenience for the driver, imposed on police clear and neutral rules as to how to treat all drivers, and left the police minimal or no discretion over whom to stop.[51] The Court faulted the lower court decision for its excessively critical inquiry of the effectiveness of sobriety checkpoints.[52]

If it needs the help, the government could certainly use the administrative search doctrines to support the wide and fairly unrestrained use of IVHS. After all, when we register our cars and license ourselves, we invite the administrative state to monitoring our driving skill, test our cars for pollution and accident dangers, and tax us for our use of roads and bridges. IVHS obviously vastly enhances the power of the state to do these regulatory jobs, but they will remain, at least in theory, merely "regulatory" jobs—indeed, regulatory jobs that supplement the exciting variety of "consumer services" that IVHS supposedly promises drivers. Indeed, when it comes to safety and traffic management, regulation and consumer service become hard to distinguish. And so long as these—and not criminal law enforcement—remain the originating purposes of IVHS, the state may retain the broad powers associated with administrative searches. Of course, those suspicious of professedly benign state power may question the premise that the advertised benefits of IVHS are the originating premise, or that it is even meaningful to speak of an originating premise for a technology whose malign potential may evolve regardless of the intentions of its designers. But arguments of that sort may be moot in the world of the administrative state already embraced by Fourth Amendment doctrine.

One other "special context" merits attention—the national borders. Here are the basic rules:

48. *Id.*
49. *Id.*
50. *Id.*
51. *Id.* at 454.
52. *Id.* at 453.

1. At fixed checkpoints at an actual border or its "functional equivalent" (that is, the confluence of two main roads right near the border), the government has virtually unrestrained power to search people and cars without a warrant, without probable cause, and without any individualized reasonable suspicion.[53] That is why, for example, customs officials at airports can search all travelers and their belongings without any individual justification. It is as if the immigration-control power is a special, categorical exigency. Or, one might say, the traveler always has the theoretical alternative of turning back. (By analogy, given the categorical exigency of hijacking, airports can search all passengers with metal detectors.) In the border case, that means that at the border itself, the officers can stop all cars, briefly look at and question passengers (who, of course, retain the privilege against self-incrimination) and look virtually everywhere in the car.

2. The government may set up fixed checkpoints some distance from the border where undocumented aliens are alleged to pass in some numbers. Here state power is somewhat weaker. Though the case law is a bit unclear, the best analogy would be to the drunk-driving roadblock. The government can probably stop all cars or every third car, etc., at such a checkpoint.[54] Then, if the initial encounter creates any further suspicion, the officers can proceed to a full *Terry* encounter or, where appropriate, an arrest. It is unclear exactly where such a checkpoint can be set up.

3. A temporary checkpoint near the border (i.e., a police or INS car just stops at a roadside) or "roving patrols" is different still. This is essentially a regular *Terry* stop requiring regular *Terry* justification. The police may stop the car based on some individualized reasonable suspicion. The problem, of course, is that the suspicion may implicitly (sometimes explicitly) be based on nothing more than the presence of several Latino-appearing people crowded into an old car at night.[55]

Despite obvious concerns that border searches can prove useful for racially prejudiced state action, the Supreme Court's predictable invocation of the special federal power over immigration and the difficulty of policing porous borders —these tend to be constitutional trump cards. But it is the fluid definition of "border" that may be most significant for the future of IVHS. Under recent cases, the "border" has effectively become any place where the police reasonably suspect concentrated movements of undocumented immigrants—even, that is,

53. United States v. Martinez-Fuerte, 428 U.S. 543, 564 (1976).

54. *Id.* at 559.

55. *See e.g.*, United States v. Brignoni-Ponce, 422 U.S. 873 (1975).

in a factory in a big city.[56] If so, all the more easily the "border" may become whatever route a car may follow to evade immigration officials. Whether IVHS technology will permit especially enhanced scrutiny of the movements or indeed the insides of cars—and possibly the appearance or languages or accents of its occupants—may be something a constitutional lawyer should worry about.

B. *When a Search is Not a Search After All*

The second category of peripheral searches or seizures is state action which turns out not to be a search or seizure at all. Unlike the administrative search approach, this approach to the intrusion of IVHS on our privacy questions not whether the intrusion is fair or necessary but whether, in a legal sense it is an intrusion in the first place. Here is a brief survey of the terrain:

The Court upheld warrantless inspections of and seizures from personal trash in *California v. Greenwood*,[57] where the police made arrangements with a neighborhood trash collector to turn over all of Greenwood's trash left on the public street. The Court said that this is not a Fourth Amendment intrusion at all, since the owner abandons any reasonable expectation of privacy when he deposits the trash outside his home for collection. The majority noted that the suspect had made it possible for any person or animal to open the opaque bags; the dissent argued that the state action nevertheless violated civilized standards of conduct; as for the abandonment issue, the dissent noted that *Katz v. United States*[58] forbids warrantless wiretaps even though a telephone operator could illicitly listen in on your conversations.

The space within which you have a Fourth Amendment expectation of privacy is often smaller than the space containing your state law property (and privacy) rights. Thus, if you own a 20-acre estate, the police may be able to look into a suspected marijuana garden 200 yards from your house without involving Fourth Amendment law at all. The police may have technically "trespassed" on your rights under state law, but you do not have any constitutional privacy right in "public" or visible private places.[59] The same goes for an aerial survey of your land or open fields. Needless to say, there is a fuzzy border between your home and open fields.

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56. INS v. Delgado, 466 U.S. 210 (1984).
57. 486 U.S. 35 (1988).
58. 389 U.S. 347 (1967).
59. Oliver v. United States, 466 U.S. 170 (1984).

In *California v. Ciraolo*[60] and *Dow Chemical Co. v. United States*,[61] the Court greatly expanded police "overflight" power, holding that vertical inspections are rarely searches in the Fourth Amendment sense. Then in *Florida v. Riley*,[62] a plurality of the Court said that helicopter searches, which are more intrusive, are still outside the Fourth Amendment. (Here the copter hovered 400 feet above a partly open greenhouse in public airspace in a position from which a fixed wing aircraft would itself have gotten a good view. and no damage occurred to the property). Ironically though, if it may be that if you stand in your open field and shoo the police away, they may have to leave. The Fourth Amendment may come into play when the police search a place outside your house, but in some very private nearby spot (like bushes or under eaves) the Court may call "curtilage."[63] A related question that gets fact-specific is whether a search warrant mentioning your house or "premises" covers outbuildings like garages or sheds.

Here is an easy one: There is essentially no right of privacy in prison or jail cells, so no warrant or any probable or even reasonable cause must be individually demonstrated to permit officials to inspect anywhere in the cells for whatever they wish to look for.[64] The Court has also held that probationers are also subject to warrantless searches without probable cause; the holding would surely apply to parolees as well.[65]

But to approach more directly whether IVHS, especially in its power over oral communication, may cross a constitutional line, we must start with the famous case of *Katz v. United States*. *Katz* held illegal a warrantless tap of a phone conversation in a phone booth, thus opening up the whole issue of what constitutes a "reasonable expectation of privacy." *Katz* overruled, among other cases, the famous *Olmstead* decision of the late 1920's in which Brandeis wrote a classic dissent about "the right to be let alone,"[66] and made it clear that the police could violate the Fourth Amendment by an intrusion that did not include an actual physical invasion of private property or space. (The old cases had tended to invalidate police eavesdropping where the technology had involved, say, a spike-mike pushed through the suspect's wall, but not a mike stuck to the wall of the adjoining apart-

60. 476 U.S. 207 (1986).
61. 476 U.S. 227 (1986).
62. 488 U.S. 445 (1989).
63. *Oliver*, 466 U.S., at 180.
64. *See* Hudson v. Palmer, 468 U.S. 517 (1984).
65. *See* Griffin v. Wisconsin, 483 U.S. 868 (1987).
66. 277 U.S. 438 (1928).

ment.) There is some complicated law about other means of getting information from private conversations. Normally, if a police undercover agent tricks you into talking to him it's a risk you take (putting aside self-incrimination issues), and his reporting of the conversation does not violate the Fourth Amendment, even if the conversation is in your house, so long as you "voluntarily" let him in.[67] The same is true if you let the undercover agent in and he is wired, so the police get a recording of the conversation.[68]

In any event, where no party to the conversation has consented to the eavesdropping, the eavesdropping would violate *Katz* unless a warrant based on probable cause were obtained. This matter is now heavily regulated by subconstitutional state and federal statutes like the 1968 Wiretap Act (Title III)[69] and the 1986 Electronic Communications Privacy Act,[70] that normally require a kind of super-probable cause, pre-wiretap court approval, rigid restrictions on the duration of the tap, and regular reports to and oversight by the authorizing judge. In this regard, IVHS may raise no new issues: If the system obviously records what drivers say, then the driver can hardly complain that the state can overhear him, and any passenger may have to take his friend as he trusts him. If IVHS systems make it easier for the state to wiretap a car phone without the driver's consent, that will presumably remain a wiretap under *Katz*. If the driver or passenger complains that the tracking or instrument reading tools of the system record information from which conversation can be inferred by its behavioral manifestations, they will have made a nice academic point of little legal constitutional significance.

III. IT IS ANYTIME OF DAY: DO YOU KNOW WHERE YOUR CITIZENS ARE?

Now to get to the most relevant doctrine: electronic surveillance of automotive movement. The current rules seem to work as follows: (1) assume a police undercover agent, or private party cooperating with the police, gives the suspect some sort of container to be used for drugs. It is not a Fourth Amendment intrusion for the police to put a tracing beeper in the container when it is given to the suspect—no warrant or proof of probable cause or even reasonable cause is

67. Hoffa v. United States, 385 U.S. 293 (1966).

68. There is also a standing issue here. If the police violate *Katz* by intercepting a purely private conversation between A and B, A and B can both raise a Fourth Amendment claim. And if A and B have this conversation in the home of C, C has standing to object too, even if she was not a party to the conversation.

69. 18 U.S.C. §§ 2510-20 (1994).

70. 18 U.S.C. § 2511(2)(a)(ii) (1994).

needed.[71] It is also not a Fourth Amendment intrusion if the police then rely on a response from the beeper to trace the suspect's movements on public highways. The Court says the beeper merely magnifies and enhances what is theoretically in plain public view anyway. However, it is a Fourth Amendment intrusion to rely on the beeper to determine that the container which was "observed" entering the home remains in the home; that inference could only be drawn if the sending of the beeper into the house were treated as a search and based on a warrant.[72] (2) It is not a Fourth Amendment intrusion for the police to put the beeper on the outside or under the bumper of an unsuspecting suspect's car to trace the car's movement, but the police would need a warrant to place a beeper inside the car.[73]

In *United States v. Knotts*,[74] federal agents placed a tracking beeper in a container of chloroform housed in a store, with the storeowner's consent. The container was picked up by Petschen, who put it in his car.[75] The police lost visual track of Petschen but used the beeper to trace him to Knotts's cabin.[76] After visual surveillance, the agents then got a warrant, executed it, and found a drug laboratory in the house.[77]

The key to the decision affirming the conviction was that Petschen's car had traveled a public thoroughfare. He thereby accepted the reasonable risk that anyone, including the police, could follow him at a non-intrusive distance and watch where he was going. The beeper merely augmented the ability of the agents' naked eyes.[78] Indeed, had the agents placed the beeper on the exterior underside of the car without Petschen's knowledge or consent, the case would have been the same: cars themselves receive little Fourth Amendment protection anyway.[79] Such old notions as the "inherent mobility" of the car give police far more leeway than they have with residences, and the "pervasive regulation" of the automobile that we all accept for the "privilege" of driving means that we cannot claim a right of privacy, at least in the exterior. If we want to enjoy the benefits of public commerce, we cannot at the same time retain the otherwise privileged boundaries of private life.

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71. United States v. Karo, 468 U.S. 705 (1984).
72. *Id.* at 714-15.
73. *See, e.g.*, cases cited in United States v. Knotts, 460 U.S. 276, 279 n.1 (1983).
74. 460 U.S. 276 (1983).
75. *Id.* at 278.
76. *Id.*
77. *Id.* at 279.
78. *Id.* at 282-83.
79. *See* note 73.

In *United States v. Karo*,[80] agents placed a beeper in a can of ether. Undetected by the police visually, the can was moved to other locations. The police might have lost track of the can had it not been for the beeper.[81] Agents saw Karo pick up ether at informant's house and then followed Karo home.[82] It then traced the movement of the can through several other houses and storage facilities, though smell, sight, and the aid of the facilities' owners aided them in confirming the location of the can. The can was finally traced to a home. *Karo* fleshed out what *Knotts* had implied: Not only may the government freely track the beeper on a public highway, in addition, if the original possessor of the can consents to the beeper's placement in the can, the unwitting receiver of the can cannot complain that the beeper has been tracking him without his realizing it. All *Karo* concedes, is that the magic constitutional line is the outside of the suspect's house: only when the beeper enters the house does it raise Fourth Amendment issues.[83]

These cases obviously offer little comfort to opponents of IVHS who hope that car tracking requires Fourth Amendment regulation. So long as IVHS is about cars and not homes, there will be little but the moral wisdom of the police to constrain state action. What about passengers? In *Ybarra v. Illinois*,[84] the Supreme Court held that a warrant to search a particularized place does not necessarily permit the police to search everyone in that place. Will everyone in a car be implicated by the suspicious conduct of the driver? *Ybarra* may be a powerful tool of civil liberties, but it applies when the police have made a search under a warrant, and it will be irrelevant if what IVHS accomplishes does not even amount to a search. If passengers in a car claim unfair surprise that the police follow their own movements—and even hear their conversations—the courts may have little trouble saying that the passenger consents to the tracking and runs the risk of the overhearing, by trusting the driver of a car.

Electronic surveillance does raise some significant Fourth Amendment concerns.[85] One is secrecy. A conventional police intrusion is likely to be boisterous or visible enough to give the individual notice, at least as of the moment of the search, of the police action. Such notice is not any formal requirement of the Fourth Amend-

80. 468 U.S. 705 (1984).
81. *Id.* at 708-9.
82. *Id.* at 708.
83. 468 U.S. at 714-15.
84. 444 U.S. 85 (1979).
85. David Steinberg, *Making Sense of Sense-Enhanced Searches*, 74 MINN. L. REV. 563 (1990).

ment—it is just a logically pragmatic adjunct of a conventional search (though some lower-court cases suggest that the Fourth Amendment should require more stringent criteria for a warrant in the case of secret searches).[86] By contrast, traditional electronic surveillance is almost always, by definition, unknown to the individual while or after it happens. This may seem intuitively unfair; moreover, secrecy reduces the suspect's ability to gather the facts on which he can retroactively challenge the intrusion. In addition, it isolates the search from the kind of public political accountability that keeps the system honest, and it raises the risk of excessively inhibiting certain legal associational or free speech activities by creating fear of the unperceivable intrusion.

The police may use IVHS simply as a technological short-cut to the kind of beeper-tracing now done under the rules described above. In that sense, IVHS raises the same sort of "secret search" concerns as wiretapping. On the other hand, if motorists are all vaguely or generally aware that the police can follow their movements all the time—that is, if they have "consented" to IVHS—then the police are not exactly acting secretly. This may, however, create an insidious but lulling sense of uncertainty as to who is being followed at any one time, and for what purpose, and cause the public to fear or disdain the police.

The history of statutory restrictions on electronic surveillance may prove a better reason for optimism than all this talk of the Fourth Amendment. Title III—the so-called Wiretap Act of 1968—properly responded to the *Katz* decision by removing from judicial fussing the criteria for and scope of legal wiretaps. The special, tailored rules of probable cause, specificity, duration, and redaction have been successful enough that—remarkably enough—they rarely arise in court at all. Though criticized as much as praised, Title III's only very fundamental flaw was one that only time would determine and future legislation could cure—its failure to apply to more novel, non-wire, and non-aural forms of communication.[87]

The 1986 ECPA filled many of those gaps, and its legislative success may have been a good example of social choice in the right arena: A remarkable convergence of government, commercial, and civil liberties parties actually agreed on a rule.[88] Crucial to this may have been the role of the business interests who manufacture and ser-

86. John Kent Walker, Note, *Covert Searches*, 39 STAN. L. REV. 545 (1987).

87. Robert Kastenmeier, Deborah Leavy & David Beier, *Communications Privacy: A Legislative Perspective*, 1989 WISC. L. REV. 715, 719.

88. *See generally id.*

vice the new technologies, and whose economic interest in pleasing their ultimate consumers may have trumped any loyalty to the perceived ideological bent of the government. In theory, at least, if consumers have some say in the technology of surveillance, business may prove to be as much the agent of the public as of the government, and market interests can drive business to help establish appropriate restrictions on governmental power.

But let me conclude by returning for a moment to Chief Justice Rehnquist's language in *Knotts*:

> A person traveling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another. When Petschen traveled over the public streets he voluntarily conveyed to anyone who wanted to look the fact that he was traveling over particular roads in a particular direction, the fact of whatever stops he made, and the fact of his final destination when he exited from the public roads onto private property.[89]

So the deeper question is what price we are willing to pay for the advantages of efficiency, especially where, as in IVHS, the advantages accrue not only, or even primarily, to law enforcement and thereby to the public only indirectly. Somewhat pregnantly, Chief Justice Rehnquist cautiously notes that *Knotts* did not present the question of 24-hour dragnet surveillance. Perhaps IVHS does. The Chief Justice speaks here with a certain world-weary deductive tone: This is all just about cars on public roads; the "rules of the road" are there, and enhanced police efficiency is not the same thing as unconstitutionality. The challenge is to move from these logically technical legal deductions to some more fundamental claim that IVHS will help the state know everything about us—that it will become, in effect, a universal general warrant executed with Star Wars hardware and software. This will require more than constitutional litigation or even open-minded "policy" discussion. It will require that a society choose how private it wants to be.

89. 460 U.S. at 281-82.